

MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA

v.

KHALID SHAIKH MOHAMMAD, WALID
MUHAMMAD SALIH MUBARAK BIN
'ATTASH, RAMZI BIN AL SHIBH, ALI
ABDUL-AZIZ ALI, MUSTAFA AHMED
ADAM AL HAWSAWI

AE555III (AAA)

Mr. al Baluchi's Reply to
Government Response To Mr. al Baluchi's
Motion To Compel the Convening Authority
To Produce a Complete Transcript of Mr.
William Castle's Testimony on 13 November
2018

21 March 2019

1. **Timeliness:** This Reply is timely filed.¹
2. **Relief Sought:** Mr. al Baluchi continues to request that the military commission grant his motion to compel the Convening Authority to produce a complete transcript of Mr. William Castle's testimony on 13 November 2018.²
3. **Law and Argument:**

The government Response reveals a strong desire to shield Mr. Castle's testimony from meaningful appellate review. The government argues that Mr. al Baluchi's motion to compel a complete transcript of Mr. Castle's testimony should be denied for three overarching reasons: (1) the transcript meets the MCA's "verbatim" standard; (2) the transcript is adequate if it contains some, but not all, of the instances that may reflect on Mr. Castle's credibility; and (3) the defense has not preserved the issue.

¹ R.C. 3.7.e.(2).

² AE555GGG (AAA).

The transcript of Mr. Castle's testimony is not "verbatim"

The military commission should decline the government's invitation to interpret the MCA beyond its plain, straightforward meaning. The MCA is clear and unambiguous: "Each military commission under this chapter shall keep a separate, *verbatim*, record of the proceedings in each case brought before it, and the record shall be authenticated by the signature of the military judge."³ Thus—unlike the Uniform Code of Military Justice ("UCMJ")—the MCA plainly requires transcripts to be verbatim.

Courts-martial cases, by contrast, require substantially verbatim transcripts. The government correctly notes that military cases reach this conclusion by construing the word "verbatim" within the legislative history of Article 54, UCMJ, to actually mean "substantially verbatim."⁴ It follows, according to the government, that the word "verbatim" within the MCA should also mean "substantially verbatim."⁵ But military cases only attempt to interpret the legislative history of the UCMJ because the statute itself was silent, and thus ambiguous, as to whether records of proceedings had to be verbatim. The MCA on the other hand is not silent. It unequivocally states the record of proceedings shall be verbatim.⁶ Further interpretation is neither necessary nor appropriate. "Where the language [of the statute] is clear, that is the end of judicial

³ 10 U.S.C. § 949o.(a) (emphasis added).

⁴ See AE555HHH (GOV) Government Response To Mr. al Baluchi's Motion To Compel the Convening Authority To Produce a Complete Transcript of Mr. William Castle's Testimony on 13 November 2018 at 4–6.

⁵ See *id.*

⁶ See 10 U.S.C. § 949o.(a).

inquiry ‘in all but the most extraordinary circumstances.’”⁷ Because Congress specifically included the word “verbatim” as plain language in the MCA, “the sole function of the courts is to enforce it according to its terms.”⁸

The transcript of Mr. Castle’s testimony is not even “substantially verbatim”

While the courts-martial substantially verbatim standard is inapplicable, the transcript of Mr. Castle’s testimony falls short of that requirement as well. The many omissions from the transcript renders the record of trial incomplete and raises a presumption of prejudice against Mr. al Baluchi.

To be clear, this is the first time Mr. al Baluchi has protested a transcript of witness testimony in this case. But the omissions here are especially crucial. Although 22 witnesses were identified as having direct knowledge of important facts related to the firing of the Convening Authority and Legal Advisor, Mr. Castle is the sole witness that the military commission compelled the government to produce. While in a strictly technical sense he may have been “a Defense witness, called by the Defense,”⁹ for all intents and purposes he was a prosecution witness.¹⁰ The military commission found Mr. Castle to be “highly credible” based “on his

⁷ *United States v. Braxtonbrown-Smith*, 278 F.3d 1348, 1352 (D.C. Cir. 2002) (quoting *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 474 (1992)).

⁸ *Caminetti v. United States*, 242 U.S. 470, 485 (1917).

⁹ AE555HHH (GOV) at 7.

¹⁰ The prosecution team met with and prepared Mr. Castle for his testimony. Unofficial/Unauthenticated Transcript of 13 November 2018 at 21156–162. However, Mr. Castle refused to even speak with defense counsel prior to his testimony. *Id.* at 21149–150.

demeanor and the manner and content of his testimony.”¹¹ The military commission subsequently denied Mr. al Baluchi’s requests for other relevant witnesses;¹² and it ruled that neither actual nor apparent unlawful influence had been shown by the defense.¹³ Under these circumstances, the credibility of Mr. Castle as a witness will be particularly significant on appellate review.

In *United States v. Campbell*, the Air Force Court of Criminal Appeals recognized that transcripts of such critical evidence “should be as accurate as possible and not ‘cleaned up.’”¹⁴ The government, however, would prefer to discard *Campbell* outright as being factually distinguishable because it involved the transcript of an Accused’s out-of-court statement rather than in-court witness testimony.¹⁵ The takeaway from *Campbell* is that an appellate court charged with reviewing proceedings below should have transcripts that are as accurate possible. The government’s tack on argument that the evidence in *Campbell* was originally presented to members while here it was instead presented to the military judge is of no consequence whatsoever.

The government next claims that the transcript is adequate if it contains some, but not all, of the instances that may reflect on Mr. Castle’s credibility.¹⁶ The government states that the transcript does note 14 occasions where the witness paused or used a vocal segregate; and the government does not need to listen to the audio and compare it to the transcript to identify what

¹¹ AE555EEE Ruling, Mr. al Baluchi’s Motion to Dismiss For Unlawful Influence over Convening Authority and Legal Advisor at 22.

¹² *Id.* at 32.

¹³ *Id.* at 31.

¹⁴ 76 M.J. 644, 652 n.4 (A.F. Ct. Crim. App. 2017).

¹⁵ *See* AE555HHH (GOV) at 7.

¹⁶ *See id.* at 7–8.

additional segregates or words are missing.¹⁷ In taking this stance the government recycles a familiar complaint: Safeguarding a fair process is unduly burdensome.¹⁸ The military commission, however, should recognize that Mr. al Baluchi's right to meaningful appellate review outweighs any government inconvenience in reviewing the transcripts for accuracy. Mr. Castle paused, spoke filler words, and/or expressed a non-verbal vocalization as part of many, if not the majority of the answers that he provided. His testimony spans 210 transcript pages.¹⁹ Yet the transcript only notes vocal segregates and pauses on approximately 14 occasions.²⁰ This small spattering throughout the 210 pages of transcript fails to accurately reflect Mr. Castle's true "demeanor and the manner and content of his testimony,"²¹ which will be subject to appellate review.

Filing a motion to compel preserved the issue of an incomplete transcript

The government's final argument is that defense counsel had a duty to preserve the record by making narrations or objections contemporaneous with the witness's testimony.²² However, counsel for Mr. al Baluchi could not have known that filler words and non-verbal vocalizations by Mr. Castle would be totally omitted from the transcript. Those instances are simply not analogous

¹⁷ See *id.*

¹⁸ See, e.g., AE551E (GOV) Government Response to Mr. al Baluchi's Second Supplement to AE551, Mr. al Baluchi's Motion to Dismiss for the Government's Denial of a Public Trial at 16–18 (arguing that it is too onerous to follow the RTMC rules providing for a public trial); AE604A (GOV) Government Response to Mr. al Baluchi's Motion to Compel Inspection of Physical Raid Evidence Obtained During Overseas Raids at 7–10 (arguing that it is too expensive and too time consuming to continue allowing Mr. al Baluchi to inspect the physical evidence against him).

¹⁹ Unofficial/Unauthenticated Transcript of 13 November 2018 at 21128–337.

²⁰ See AE555HHH (GOV) at 8.

²¹ AE555EEE Ruling at 22.

²² See AE555HHH (GOV) at 8–10.

to the examples cited by the government wherein counsel notated for the record a witness's physical movements. And, it is common for counsel to notate physical gestures and other movements by a witness. Here, by contrast, actual noises were made and actual words spoken. It was reasonable for defense counsel to expect those instances to be documented without requiring further comment. Upon reviewing the transcript, counsel for Mr. al Baluchi objected at the first opportunity.

For the foregoing reasons, the military commission should grant Mr. al Baluchi's motion to compel the Convening Authority to produce a complete transcript of Mr. William Castle's testimony on 13 November 2018.

4. Attachments:

A. Certificate of Service

Very respectfully,

//s//
JAMES G. CONNELL, III
Learned Counsel

//s//
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Counsel for Mr. al Baluchi

Attachment A

CERTIFICATE OF SERVICE

I certify that on the 21st day of March, 2019, I electronically filed the foregoing document with the Clerk of the Court and served the foregoing on all counsel of record by email.

//s//

JAMES G. CONNELL, III
Learned Counsel